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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

17 TIMOTHY and JEANNE DuFOUR and
18 KENNETH TANNER, individuals, on
their own behalves and on behalf of all
others similarly situated,

19 Plaintiffs,

20

BE., LLC, DYNAMIC SHOWCASES,
LLC, California limited liability
companies, MONTEREY FINANCIAL
SERVICES, INC., a California
corporations, BE MARKETING
LIMITED, a private limited company
registered in England and Wales, ERIK
DeSANDO, BARRY FALCK, JACOB
STEINBECK, and DOES 1-100, inclusive.

26 Defendants.

No. 09-03770-CRB

Judge Charles R. Breyer

**PLAINTIFFS' REPLY BRIEF
SUPPORTING CLASS CERTIFICATION**

Date: April 19, 2013

Time: 10:00 a.m.

Location: Courtroom 6, 17th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

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REPLY BRIEF SUPPORTING CLASS CERTIFICATION

1 In their Motion, Plaintiffs presented sufficient evidence that the Class proposed in the
 2 motion for class certification meets all of the elements under Rule 23(a), and satisfies Rule
 3 23(b)(2) and 23(b)(3) as well.¹ Defendant Monterey Financial Services, Inc.'s ("Monterey")
 4 Opposition wholly fails to rebut this evidence.

5 Monterey confuses Plaintiff's motion for class certification with a motion for summary
 6 judgment. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) does not require Plaintiffs to
 7 prove their claims on this Motion; Plaintiffs only have to show that the evidence common to the
 8 class claims will outweigh individualized evidence. Monterey also opposes class certification by
 9 seizing on (largely conjectural) factual variations in Be's marketing and services, Class
 10 members' states of mind, their actions, and their damages, and its own conduct and knowledge.
 11 Class certification is appropriate because every material fact can be proved through common
 12 evidence, can be reasonably inferred from Be's representations and Class members' conduct, or
 13 can be determined through a ministerial review of official records. Monterey also attacks Jeanne
 14 DuFour's typicality and adequacy as a class representative, but these attacks are based on
 15 misleading characterizations of the record and immaterial factual distinctions.

I. A Motion for Class Certification Is Not a Substitute for a Motion for Summary Judgment

18 Monterey contends that, after *Dukes*, Plaintiffs not only had to prove their claims were
 19 appropriate for class treatment, but also that the claims would prevail.² Monterey fundamentally
 20 misstates the relationship between class certification and the merits of the class claims. The
 21 Supreme Court recently reiterated the division between class certification and a determination of
 22 the merits. *See Amgen Inc. v. Connecticut Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1202-03,
 23 1204 (2013).

24 Although we have cautioned that a court's class-certification analysis must be

25 ¹ Plaintiffs' motion for class certification defined the proposed Class as
 26 all persons listed in the Excel spreadsheet titled "DuFour-Tanner Discovery
 27 Spreadsheet (08.22.11).xls.XLS" ("Spreadsheet") which was produced to
 28 Plaintiff's counsel by Monterey Financial Services, Inc. on or about August 22,
 2011, listed as having signed a Type 2 contract.

2 ² *See, e.g.*, Def.'s Opp. at 9 ("Plaintiffs' class certification motion must consider whether the
 28 claims are even actionable against Monterey").

“rigorous” and may “entail some overlap with the merits of the plaintiff’s underlying claim,” [quoting *Dukes*, 131 S. Ct. at 2551], Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—*but only to the extent*—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.

Id. at 1194-95 (emphasis added). Hence, the argument that the court “should deny class certification because [plaintiff] will lose on the merits [is] contrary to well-established precedent.” *Tait v. BSH Home Appliances Corp.*, No. 10-0711, 2012 WL 6699247, *21 (C.D. Cal. Dec. 20, 2012) (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011)). If Plaintiffs have not presented each and every piece of evidence that Monterey would require of them, that is because this is a motion for class certification – not a motion for summary judgment.

A. Plaintiffs’ Evidence Is Sufficient for Class Certification

On March 20, Monterey filed over twenty pages of objections to the declarations supporting Plaintiffs’ motion for class certification. (Dkt. #200-202.) Although these objections are ill-founded, Plaintiffs will not engage in a point-by-point rebuttal here.³ The Federal Rules of Evidence do not stringently control the evidence used to decide a class certification motion. Cf. *Keilholtz v. Lennox Hearth Prods. Inc.*, 268 F.R.D. 330, 337 n. 3 (N.D. Cal. 2010) (“the Federal Rules of Evidence take on a substantially reduced significance, as compared to a typical evidentiary hearing or trial”; quotation omitted). As class certification involves “no findings of fact” or “ultimate conclusions on [p]laintiffs’ claims,” the Court “may consider evidence that may not be admissible at trial.” *Alonzo v. Maximus, Inc.*, 275 F.R.D. 513, 519 (C.D. Cal. 2011) (quoting *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 616 (C.D. Cal. 2008)). Rather, the Court “may consider inadmissible evidence at the class certification stage,” and Monterey’s objections to Plaintiffs’ declaration should be overruled because “strict adherence to the Federal Rules of Evidence” is not required in a motion for class certification. *Gonzalez v. Millard Mall*

³ As a procedural matter, Monterey’s objections are untimely (despite a two-week extension) because they should have “contained within [Monterey’s opposition] brief.” Civil L.R. 7-3(a). Further, if Monterey had included the twenty some pages of objections in its Opposition as Local Rule 7-3(a) requires, the Opposition would have been significantly oversize.

Servs., Inc., 281 F.R.D. 455, 459, 460 (S.D. Cal. 2012).⁴ Rather, the Court only needs enough “material sufficient to form a reasonable judgment on each [of Rule 23’s] requirement[s.]” *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975) (an “extensive evidentiary showing . . . is not required”). The declarations supporting Plaintiff’s motion for class certification meet this permissive standard.

B. Plaintiffs' Class Definition Properly Excludes Any Merits-Based Determination

Monterey faults Plaintiffs' Class definition as being "unusual and awkward because it does not reference any particular harm allegedly suffered by the class or define the class in terms of having relied upon any alleged misrepresentation[.]" (Def.'s Opp. at 7-8.) By the same logic, Monterey argues that Plaintiffs have not established numerosity. (*Id.* at 11, 12, 14.) These arguments are obviously wrong. "There is no requirement that a class be defined to include only those with meritorious claims. Class certification does not depend on the ability of the named plaintiffs or class members to win on the merits." *Friedman v. 24 Hour Fitness USA, Inc.*, No. No. 06-6282, 2009 WL 2711956, *4 (C.D. Cal. Aug. 25, 2009).

These arguments betray Monterey’s fundamental misunderstanding of the relationship between a class definition and the merits of the class’s claims. A class “must be sufficiently definite,” meaning that the “class definition [must be] precise, objective, and presently ascertainable[.]” *Gray v. Golden Gate Nat. Recreational Area*, 279 F.R.D. 501, 508 (N.D. Cal. 2011) (citation, punctuation omitted). Consequently, it is inherently improper to define a class in a way that incorporates a determination of the merits. *See Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 672-73 (N.D. Cal. 2011) (“class definition is inadequate if a court must make a determination of the merits of the individual claims to determine whether a person is a member of the class”; citation omitted).⁵ Monterey urges a facially deficient class definition which

⁴ See also *Guadiana v. State Farm Fire & Cas. Co.*, No. 07-326, 2010 WL 5071069, *5 (D. Ariz. Dec. 7, 2010).

⁵ See also *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 558 (N.D. Cal. 2007) (class definition is “improper [where] it would be impossible to determine whether a [person] was a member of the class without reaching the merits of Plaintiffs’ claims”). “An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining the class should avoid . . . terms that depend on resolution of the merits (e.g., persons who were

1 fundamentally confuses merits and class certification. By the same token, Monterey's argument
 2 that Plaintiffs have not proved numerosity because their class definition depends on the
 3 individuals identified in the Spreadsheet "without any mention in the class definition of a
 4 particular alleged injury" is fundamentally incorrect. (Def.'s Opp. at 11.) The Class satisfies Rule
 5 23's numerosity element, because there are 1,754 Class members under the definition advanced
 6 in the Motion. (Preston Decl. ¶¶3-5.)

7 **II. The Material Facts Show This Case Is Readily Susceptible to Class Certification**

8 Contrary to the Opposition, those facts which are *material* to Plaintiffs' class claims
 9 support class certification. Plaintiffs' class claims arise under three basic legal theories. First,
 10 Plaintiffs allege that Be breached its contracts when it went out of business and stopped
 11 performing on its contracts. (*See* SAC ¶¶108-11, 187, 213.) While Monterey's Opposition
 12 largely ignores this theory of liability, it is clear that Be went out of business shortly after this
 13 complaint was filed – while many class members' contracts were still in force. (DeSando Decl.
 14 ¶¶34-37, 40-41.) Plaintiffs also assert that Be's contracts with Class members violated the
 15 Advance Fee-Talent Services Act (Cal. Lab. Code §§ 1701-1701.20 (2009)) ("AFTSA"). (SAC
 16 ¶¶57-58, 63-73, 129-33.) As set forth below, Plaintiffs can prove that AFTSA does apply to
 17 every Class members' contract by (1) common evidence; (2) reasonable inferences from Be's
 18 representations and Class members' conduct; and (3) ministerial review of relevant business
 19 records. Finally, Plaintiffs allege that Monterey knowingly participated in a fraudulent scheme to
 20 induce Class members into paying money to obtain Be membership. (*Id.* ¶¶120-28, 145-60.)
 21 Again, Plaintiffs can show a reasonable inference that Class members' relied on Be's
 22 representations through common proof. (*Cf.*, e.g., Preston Decl. ¶8; DeSando Decl. ¶¶5-17.)

23 **A. The Date Be Went Out of Business Is a Fact That Is Common to Every Class Member**

24 Monterey does not contest that Be stopped provided its members services when it went
 25 out of business in early 2009. (*Cf.* DeSando Decl. ¶¶34-37, 40-41.) After that point, there could
 26 be no variations in the services Be provided because Be provided none – the termination of Be's
 27

28 discriminated against)." Manual for Complex Litigation § 21.222 (4th ed. 2004) (quoted by
Lewis v. First American Title Ins. Co., 265 F.R.D. 536, 554 (D. Idaho 2010)).

1 services in early 2009 is a fact common to each and every Class member. In turn, this common
 2 fact will answer questions about whether Be breached the contracts with Class members. *Cf.*
 3 *Dukes*, 131 S. Ct. at 2551 (commonality exists when a class action will “generate common
 4 answers apt to drive the resolution of the litigation”).

5 **B. AFTSA Applies to Every Class Members’ Contract**

6 The most significant common question in this case is whether AFTSA section 1701.4
 7 applied to the Class members’ contracts. To have section 1701.4 apply, Plaintiffs must show that
 8 (1) Class members were “artists”; (2) Class members paid Be “advance fees”; and (3) Be was an
 9 “advance-fee talent service,” consistent with AFTSA’s statutory definitions. Cal. Lab. Code §
 10 1701(a), (b), (c) (2009). Each of these elements can be established by common proof, reasonable
 11 inference, or ministerial review of official records.

12 **Artists:** It can readily be inferred from Be’s representations and its contracts that Class
 13 members’ children constituted “artists” under AFTSA. *Cf.* Cal. Lab. Code § 1701(c) (2009)
 14 (“persons who seek to become . . . actors or actresses . . . and other . . . persons rendering
 15 professional services in motion picture, theatrical, radio, television, and other entertainment
 16 enterprises”). Here, “[t]he gist of [Be’s marketing] was that Be had the experience, connections,
 17 and the relationships to facilitate its clients’ professional success in the entertainment industry.”
 18 (DeSando Decl. ¶15.) For instance, both versions of Be’s marketing manuals used the exact same
 19 language to instruct Class members how to register online to look for work in the entertainment
 20 industry. (Dkt. #187-3 at 8; Dkt. #187-5 at 9.) Both versions of Be’s marketing manuals extolled
 21 the opportunities to obtain an agent through Be’s services:

22 Agents, managers and casting directors are always looking for new talent. Talent
 23 showcases are your opportunity to interview with several of these professionals at
 24 once with the goal of gaining representation. Showcases give you a chance to
 25 experience a real audition. . . . The agents will personally contact you if they are
 26 interested in representation.

27 (Dkt. #187-3 at 14; Dkt. #187-5 at 7.) Likewise, each version of Be’s contracts contain the same
 28 language which strongly implies the motivation inherent in retaining Be’s services:

29 We are an entertainment company that offers a membership comprised of a
 30 collection of resources, discounts and a support system designed to help
 31 individuals get started on a pathway to success. . . . Purchaser acknowledges and

1 agrees that none of the offerings of be. [sic] include any promise or guarantee of
 2 employment in the entertainment industry, whether oral or written, expressed or
 3 implied.
 4

(Dkt. #187-6 at 2; Dkt. #187-7 at 2; Dkt. #187-10 at 4.) Given the foregoing, the most logical
 3 inference is that Class members relied on these representations and sought professional
 4 employment in the entertainment industry:

5 Generalized proof that the common, uniform written sales marketing materials are
 6 misleading . . . would give rise to a common sense inference that no rational class
 7 member would purchase the [services] in question[]]. . . [R]eliance can be shown
 8 where it provides the “common sense” or “logical explanation” for the behavior
 9 of plaintiffs and the members of the class.

10 *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 491-92 (C.D. Cal. 2006) (citing, e.g.,
 11 *Peterson v. H & R Block*, 174 F.R.D. 78, 85 (N.D. Ill. 1997)). The “common sense inference”
 12 here is that Class members’ paid Be because their children in fact sought professional
 13 employment in the entertainment industry. It is “logical” to hold that consumer’s purpose in
 14 obtaining a service is a common question appropriate for certification where “[c]onsumers are
 15 nearly certain to rely on prominent (and prominently marketed) features of a [service] which they
 16 purchase.” *In re Nat’l W. Life Ins. Deferred Annuities Litig.*, 268 F.R.D. 652, 665 (S.D. Cal.
 17 2010). Such inferences apply to other states of mind besides reliance. In *Bomersheim v. Los*
 18 *Angeles Gay and Lesbian Center*, 184 Cal.App.4th 1471 (2010), the court held it was reasonable
 19 to infer that it was the defendant’s disclosure to the class members that it had provided them with
 20 the wrong medication that motivated class members to obtain additional medical testing and
 21 treatment. *Id.* at 1485. “It is not necessary to show an individual’s motivation by direct evidence.
 22 Whether one party’s conduct induced another party’s response can often be inferred from the
 23 circumstances attending the transaction.” *Id.* at 1484 (citing *Vasquez v. Superior Court*, 4 Cal.3d
 24 800, 814 (1971)). Stated more categorically, “[i]n the class context, where individuals are
 25 uniformly subjected to a material stimulus and thereafter uniformly act in a manner consistent
 26 with a reasonable response, a classwide inference is raised that the stimulus caused the
 27 response.” *Id.* at 1485 (emphasis supplied).

28 **Advance Fees:** AFTSA defined an “advance fee” as any fee “due from or paid by an
 artist prior to the artist obtaining actual employment as an artist or prior to the artist receiving

1 actual earnings as an artist or that exceeds the actual earnings received by the artist as an artist.”
 2 Cal. Lab. Code § 1701(a)(1) (2009). Again, it can be readily inferred from Be’s marketing and
 3 contracts that Class members had not obtained professional employment in the entertainment
 4 industry – precisely because they sought such employment through Be’s services.

5 Monterey has argued that Plaintiffs must present evidence of “the outcome of [Class
 6 members’] Be membership.” (Def.’s Opp. at 23. *See also id.* at 21.) If the Court finds (based on
 7 this argument) that it needs more concrete evidence about whether and when Class members
 8 obtained professional employment in order to determine whether the sums paid to Be/Monterey
 9 were “advance fees” under AFTSA, such evidence is readily available. Be’s marketing was
 10 directed at minors. (DeSando Decl. ¶4.) In California, “minor[s] desiring to be employed in the
 11 entertainment industry must obtain an Entertainment Work Permit” from the Division of Labor
 12 Standards Enforcement (DLSE). Cal. Code Regs., tit. 8, § 11753. Employers also need to obtain
 13 permits to employ minors in the entertainment industry from the DLSE. *See* Cal. Code Regs., tit.
 14 8, § 11752. Hence, the DLSE maintains a centralized repository of work permits that would
 15 permit Plaintiffs to prove that Class members’ children did or did not work in the entertainment
 16 industry prior to entering into their contract with Be. (Preston Decl. ¶3.) Even if further inquiry is
 17 required on Class members’ employment in the entertainment industry, that is “a limited,
 18 straightforward factual determination that would not preclude finding commonality.” *Evon v.*
 19 *Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029-30 (9th Cir. 2012) (whether defendant
 20 addressed letters to class members’ employers). “Even if some individual inquiry is required, it
 21 will consist of limited, straightforward factual determinations that would not preclude a finding
 22 of commonality.” *Herrera*, 274 F.R.D. at 667 (whether anti-deficiency laws applied to loans).

23 **Advance-Fee Talent Service:** Based on the contents of Plaintiffs’ individual contracts
 24 and Be’s website, the Court previously held Be fell “within AFTSA’s broad definition of an
 25 advance-fee talent service.” *DuFour v. Be., LLC*, No. 09-3770, 2009 WL 4730897, *4 (N.D. Cal.
 26 Dec. 7, 2009). Plaintiffs’ evidence establishes Be used the same language in all of its contracts
 27 and marketing materials. (DeSando Decl. ¶¶14-15, 17; Amended DeSando Decl. ¶2.) It follows
 28 that there is sufficient evidence that Be constituted an “advance-fee talent service” under AFTSA

1 with respect to each Class member. Cal. Lab. Code § 1701(b) (2009).

2 **Section 1701.4 Applies to Every Class Member's Contract with Be:** Section 1701.4
 3 imposed various requirements on “[e]very contract or agreement between an artist and an
 4 advance-fee talent service for an advance fee[.]” Cal. Lab. Code § 1701.4(a) (2009). Class
 5 members’ contracts were all virtually identical (*cf.* Dkt. #187-6; Dkt. #187-7; Dkt. #187-10) and
 6 none of them complied with section 1701.4, most significantly with the requirement to notify
 7 consumers of their right to refund and right to cancel under AFTSA. *Cf.* Cal. Lab. Code §
 8 1701.4(a)(4) (2009). While Monterey is fixated on the question of whether this renders Be’s
 9 contracts merely “voidable” rather than “void,” that question goes to the case’s merits – not
 10 about class certification. (Def.’s Opp. at 4, 13-14, 22.)

11 **C. The Evidence Shows Be Operated a Common Scheme on All Class Members**

12 The Court previously held that Plaintiffs could allege claims of common law fraud and
 13 civil RICO arising from Be’s misrepresentations that Plaintiffs “were led to believe that being
 14 selected [by Be] at all was some indicator of talent and possibility of success,” when in fact
 15 “there was no process that selected only those who ‘meet the industry profile’ [and] [e]verybody
 16 who could pay was selected.” *Dufour v. Be., LLC*, No. 09-03770, 2010 WL 2560409, 5, 11 (N.D.
 17 Cal. June 22, 2010). As set forth above, Be made relevant common representations in its
 18 contracts, its marketing materials, and on its website. (DeSando Decl. ¶¶14-17; Amended
 19 DeSando Decl. ¶2; Preston Decl. ¶¶6-8.) In addition, Be used a common video presentation in
 20 every one of its sales pitches. (DeSando Decl. ¶¶14-15.) This is a sufficient basis for a classwide
 21 inference of reliance. *See, e.g., Blackie*, 524 F.2d at 908; *Negrete*, 238 F.R.D. at 491-92.

22 **III. Monterey Has Not Rebutted the Evidence that Plaintiffs’ Claims Are Appropriate
 23 for Class Certification**

24 The Opposition presents a long laundry list of possible factual variations that purportedly
 25 derail class certification. On examination, however, it is clear that this scattershot approach relies
 26 heavily on variations that are not material to the class claims, overstatement, and conjecture.
 27 Those material variations which actually do exist can be readily resolved with ministerial review.

28 **A. There Are No Variations Material to Plaintiffs’ Contract-Based Claims**

1 While Monterey repeatedly tries to argue that variations in the services Be provided Class
 2 members preclude class certification, this falls apart on cursory examination. (Def.'s Opp. at 4,
 3 13, 14, 16, 22.) Monterey argues that Plaintiffs need to prove "what services [Class members]
 4 received," but it does not contest that Be went out of business or that Be stopped providing
 5 services when it did so. (*Cf. id.* at 22-23.) There is a date when Be stopped performing its
 6 contracts common to every Class member. Monterey argues that Plaintiffs need to prove "what
 7 services each [Class member] was offered," but it is clear from common evidence (including
 8 Be's website, its three sales contracts, and two marketing manuals) exactly what services Be
 9 offered. (*Id.* at 22. *Cf.* DeSando Decl. ¶¶14-17; Amended DeSando Decl. ¶2; Preston Decl. ¶¶6-
 10 8.) Monterey argues that Plaintiffs have to prove "who [Class members] dealt with at Monterey
 11 and Be," but provides absolutely no explanation why this is relevant. (Def.'s Opp. at 23.)
 12 Monterey also argues that Plaintiffs need to prove "when each [Class] member contracted [with
 13 Be] . . . what payments were made [and] what payments were missed[.]" (*Id.* at 22-23.) But this
 14 information is already contained in the Spreadsheet. (Preston Decl. ¶3.) Moreover, this
 15 information could only be relevant to damages, and differences in class members' damages "do
 16 not defeat certification, even where individualized evidence may be necessary for purposes of a
 17 damages calculation." *In re Chase Bank USA, N.A. CHECK LOAN Contract Litig.*, 274 F.R.D.
 18 286, 292 (N.D. Cal. 2011) (citation omitted). For the same reason, it is irrelevant to class
 19 certification whether Class members are "identical as to the amounts charged or the duration of
 20 the contract[.]" (Def.'s Opp. at 16.)

21 **B. Monterey's Efforts to Collect on Be's Contracts Can Be Proved Through
 22 Ministerial Review of Monterey's Records**

23 Certain of the Plaintiffs' class Rosenthal Act claims will hinge on Monterey's
 24 communications with class members. (*Cf., e.g.*, SAC ¶174 (Monterey failed to send written
 25 notice required under 15 U.S.C. § 1692g(a) after communicating with Class members, thereby
 26 violating Cal. Civ. § 1788.17).) Monterey maintains records of its communications with Class
 27 members (Preston Decl. ¶10) but contends that resolving those claims nonetheless requires a
 28 "thorough review and analysis of the content of those communications [and] testimony from, at

1 the very least, Monterey and the consumer.” (Def.’s Opp. at 17.)

2 Monterey misapprehends Rule 23’s application to the Rosenthal Act claims. The need for
 3 some ministerial review does not instantly derail class certification. Monterey baldly asserts that
 4 the Rosenthal Act claims “cannot be resolved simply with a ‘ministerial’ review of records to see
 5 who Monterey did or did not contact.” (Def.’s Opp. at 17.) Many other courts have used
 6 ministerial review to resolve exactly these sorts of factual questions in class actions. *Cf. Wiener*
 7 *v. Dannon Co., Inc.*, 255 F.R.D. 658, 670 (C.D. Cal. 2009) (class certification proper because
 8 defendant’s records made “determination of whether a potential class member is precluded from
 9 obtaining damages . . . a mere mechanical task”).⁶ Monterey offers absolutely no explanation
 10 why ministerial review would be inappropriate here, when it was appropriate in these cases.

11 **C. Class Certification of the Scienter Claims Is Appropriate Because Be
 12 Employed A Scheme Common to Every Class Member**

13 Monterey relies heavily on conjectured factual variations to argue against class
 14 certification of the scienter-based claims. For instance, Monterey assumes there were variations
 15 in the representations by Be’s scouting companies which occurred outside Be’s presence. (*Cf.*
 16 Def.’s Opp. at 12 *with* DeSando Decl. ¶4.) This is immaterial, because the gravamen of
 17 Plaintiffs’ scienter claims is the representations Be made in the sales pitch *after* the screen test.
 18 (DeSando Decl. ¶¶5-17.)

19 To the extent it identifies specific factual variations relevant to certification of the
 20 scienter claims, Monterey consistently overstates them. For instance, Monterey cavails that Be
 21 had “multiple versions of the marketing manual” – but Monterey is referring to two virtually
 22 identical manuals. (*Cf.* Def.’s Opp. at 12 *with* DeSando Decl. ¶14.) Likewise, Monterey also
 23 argues that the DeSando declaration does not indicate Be’s sales pitch was “scripted or in any

24 ⁶ See also *Hunt v. Check Recovery Sys., Inc.*, 241 F.R.D. 505, 514 (N.D. Cal. 2007) (where
 25 “legal issues arising from Defendant’s demand letters are the same for each class member,”
 26 “only individual issues are ministerial, e.g. identifying class members and calculating actual
 27 damages”); *Campion v. Credit Bureau Servs., Inc.*, 206 F.R.D. 663, 676 (E.D. Wash. 2001)
 28 (class certification permitted where “a straightforward, ministerial review of Defendants’
 documents” would identify class members); *Connor v. Automated Accounts, Inc.*, 202 F.R.D.
 265, 271 (E.D. Wash. 2001) (class certification appropriate where class members could be
 identified “by conducting a ministerial review of [defendant’s] records [that would] not
 overwhelm the common central legal question”).

1 way uniform.” (*Cf.* Def.’s Opp. at 15.) In fact, DeSando identifies a video presentation that was
 2 at the center of Be’s sales pitch. (DeSando Decl. ¶¶14-15.)

3 Most importantly, Monterey overstates the legal significance of these variations.
 4 Monterey contends that *any* variations in “representations do create a lack of commonality and
 5 specifically preclude a presumption of common reliance.” (Def.’s Opp. at 16.) The Ninth Circuit
 6 has specifically rejected the argument that class plaintiffs in a fraud case must show

7 a specifically-worded false statement repeated to each and every borrower of the
 8 plaintiff class . . . The class action mechanism would be impotent if a defendant
 9 could escape much of his potential liability for fraud by simply altering the
 wording or format of his misrepresentations across the class of victims.

10 *In re First Alliance*, 471 F.3d 977, 992 (9th Cir. 2006). *See also id.* at 990 (rejecting argument
 11 that representations had to be made “in a uniform manner and that the uniform
 12 misrepresentations came directly from the written, standardized sales pitch”). ***The exact
 13 wording of the oral misrepresentations, therefore, is not the predominant issue. It is the
 14 underlying scheme which demands attention.*** *Id.* at 991. (citation omitted, emphasis added).
 15 To the extent Monterey’s authorities hold otherwise, they are inconsistent with *In re First*
 16 *Alliance*, which is binding authority on this Court. (*Cf.* Def.’s Opp. at 16.) In light of *In re First*
 17 *Alliance* and Be’s common sales practices and common marketing materials, it is sufficient for
 18 Plaintiffs to show that “[t]he gist of [Be’s marketing] was that Be had the experience,
 19 connections, and the relationships to facilitate its clients’ professional success in the
 20 entertainment industry,” but that in fact Class members were selected on the basis of their ability
 21 to pay. (DeSando Decl. ¶15. *Cf. id.* ¶11-12.) *In re First Alliance* rebuts Monterey’s assertion that
 22 Plaintiffs must prove “what each putative class member was specifically told, by whom, and
 23 when.” (Def.’s Opp. at 21.) Conversely, the Class members’ “talent,” “relative ‘ability to pay,’”
 24 and their subsequent success in the entertainment industry are irrelevant, because they do not
 25 rebut the evidence that Be misrepresented its criteria for selecting clients. (*Id.* at 13, 21. *Cf.*
 26 DeSando Decl. ¶8, 10 (describing Be’s actual criteria for selecting clients).) Be had thousands of
 27 clients and some would have surely succeeded with or without Be. By analogy, a stopped clock
 28 might be right two times a day – but that does not change the fact that it is not broken and

1 consistently misstates the time.

2 **D. Monterey's Knowledge is a Common Fact**

3 Monterey contends that its knowledge is an individualized fact. (Def.'s Opp. at 4, 13.)
 4 This makes no sense. Monterey "either knew of [Be's] scheme to defraud and took steps
 5 substantially to advance the scheme or it didn't. Either way, its knowledge and assistance (if any)
 6 predominates as a common issue." *Joint Equity Committee of Investors of Real Estate Partners,*
 7 *Inc. v. Coldwell Banker Real Estate Corp.*, 281 F.R.D. 422, 434 (C.D. Cal. 2012) (citation
 8 omitted).⁷

9 **IV. The DuFours Are Typical and Adequate Class Representatives**

10 Monterey's attacks on the typicality and adequacy of Jeanne DuFour as a class
 11 representative are inherently suspect. (Def.'s Opp. at 16-19.) A defendant "prefer[s] not to be
 12 successfully sued by anyone"; having the defendant weigh in on class representatives' typicality
 13 and adequacy "is a bit like permitting a fox, although with a pious countenance, to take charge of
 14 the chicken house." *In re Diasonics Sec. Litig.*, 599 F. Supp. 447, 452 (N.D. Cal. 1984) (citation
 15 omitted). Hence, Monterey's attacks on "the typicality and adequacy of the plaintiffs' class
 16 representatives is somewhat problematic." *Id.* First, Monterey attacks Jeanne DuFour, but does
 17 not dispute that Timothy DuFour (or another Class member) could serve as representative in her
 18 stead.⁸ Second, Monterey relies on misleading characterizations of Jeanne DuFour's testimony at
 19 her deposition. Third, none of the "problems" Monterey identifies actually impair DuFour's
 20 typicality or adequacy.

21 **A. Monterey Characterization of DuFour's Deposition is Misleading**

22 While most of Monterey's mischaracterizations of DuFour's testimony are not literally
 23 false, they are misleading. Most significantly, Monterey contends "DuFour was never told as an
 24 inducement to her signing up that Be members were selected on the basis of talent or
 25 marketability." (Def.'s Opp. at 19.) Monterey relies on DuFour's testimony about what she was

26 ⁷ See also *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010)
 27 (whether defendant "was aware of the existence of the alleged defect" was a common issue,
 28 citing *Chamberlain v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005)).

⁸ See, e.g., *Stickrath v. Globalstar, Inc.*, No. 07-1941, 2008 WL 5384760, *7-8 (N.D. Cal.
 Dec. 22, 2008); *Nat'l Fed'n of Blind v. Target Corp.*, 582 F. Supp. 2d 1185 (N.D. Cal. 2007).

1 told *prior* to the screen test. (*Id.* at 7, 18.) But this is not the complete story: DuFour testified she
 2 viewed the following statements on Be's website:

3 “Are all the children selected from the screentest? Unfortunately no. Only a small
 4 percentage of the children screened, meet the industry profile that top agents,
 talent managers and casting directors are looking for.”

5 (DuFour Dep. 184:2-25.) Moreover, the DuFours “found out what the expectations could be, that
 6 they could earn money” during the sales pitch *after* the screen test, when Be explained “what
 7 potentially [it] could, quote, unquote, do for [them] and [their] child.” (*Id.* at 70:23-71:3.) Based
 8 on Be's sales pitch, DuFour believed “it was virtually assured that [her] child would be in
 9 television and films.” (*Id.* at 146:5-25.)

10 That was the pitch. If you did what [Be] asked you to do and you went to
 11 everything that [Be] told you to do and you did the Dynamic Showcases, that
 12 pretty much your kid would be working, whether it was on one of their local
 13 productions or in the regular TV and movies.

14 (*Id.* at 145:14-19.) While DuFour did not recall specific language from Be's sales pitch (*id.* at
 15 69:16-77:12), that is immaterial where there is “evidence of a ‘centrally orchestrated strategy’”
 16 and “the ‘center of gravity of the fraud transcends the specific details of oral communications.’”
 17 *In re First Alliance*, 471 F.3d at 991 (citation omitted). *See also id.* (“exact wording of the oral
 18 misrepresentations . . . is not the predominant issue [but] the underlying scheme”) (same).
 19 Plaintiffs' scienter claims do not require a specific false statement or a specific omission” to
 20 prevail on the merits, so long as they prove there was “a scheme reasonably calculated to
 21 deceive.” *United States v. Woods*, 335 F.3d 993, 998, 999 (9th Cir. 2003) (citation omitted).

22 Monterey mischaracterizes DuFour's testimony on other significant points. Monterey
 23 repeatedly asserts that DuFour never cancelled her contract (Def.'s Opp. at 17, 18, 19), but what
 24 DuFour actually testified was that she did not “seek to cancel [her Be] membership *within three*
 25 *days* [after signing Be's contract].” (DuFour Dep. at 88:18-20 (emphasis added).) Be's contracts
 26 contained a three day cancellation provision (in violation of, e.g., AFTSA's requirement for a
 27 ten-day cancellation provision). (*Cf.* Dkt. #187-6 at 3; Dkt. #187-7 at 3 with Cal. Lab. Code §
 28 1701.4(d) (2009).) The issue is not whether DuFour cancelled her contract, but whether she
 could obtain a refund of the fees paid to Be/Monterey. In fact, **DuFour repeatedly asked to have**

1 ***her fees refunded.*** (See *id.* at 158:16-159:8.) Likewise, Monterey asserts that the DuFours' 2 daughter obtained "work" (Def.'s Opp. at 17, 18, 19), but she was merely acted (on one 3 occasion) as an unpaid extra in one of Be's own television show. (DuFour Dep. at 98:14-15.) 4 Monterey indicates DuFour had no expectations for Be's screen test (Def.'s Opp. at 19), but 5 DuFour's complete testimony was that the significance of the screen tests was not explained to 6 her "[a]t that time. . . You didn't find that out until after they were selected or you got a call 7 back." (DuFour Dep. 58:14-18. Cf. *id.* at 70:23-71:3.)

8 Monterey outright misrepresents the record on other points. Monterey contends that
9 DuFour “admits she received everything she bargained for.” (Def.’s Opp. at 18.) Monterey does
10 not support this assertion with any citation to the record, because Dufour never said anything of
11 the sort. While *Monterey* repeatedly contends DuFour “received the benefit of her bargain,” this
12 is just not true. As DuFour paid for five years of service in 2009, Be was obligated to provide
13 services to her through March 2014, which it clearly did not do. (*Cf.* Dkt. #7-2 at 6.)

B. None of the Differences Between Jeanne DuFour and Other Class Members Render Her Atypical

In sum, Monterey can at most contend that Be represented to DuFour that her daughter was selected on merit via the Internet (rather than orally), that DuFour's daughter appeared one time on Be's television as an unpaid extra, that DuFour did not cancel her contract within three days after signing it, and she did not seek services from My Talent Services after Be shut down. These variations do not make DuFour atypical. “[T]he typicality requirement is ‘permissive[.]’” *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (citation omitted). A class plaintiff’s claims are typical “if they are reasonably co-extensive with those of absent class members; [but] they need not be ***substantially identical.***” *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042 (9th Cir. 2012) (same; emphasis added). “Cases ‘challenging the same unlawful conduct which affects both the named plaintiffs and the putative class’ usually satisfy the typicality requirement, ‘irrespective of the varying fact patterns underlying the individual claims.’” *Brown v. American Airlines, Inc.*, 285 F.R.D. 546, 557 (C.D. Cal. 2011) (same).

C. DuFour Is an Adequate Class Representative

1 Monterey contends DuFour is an inadequate class representative because “[s]he does not
 2 have the same interest [because] she did not suffer the alleged injury.” (Def.’s Opp. at 19
 3 (citation omitted).) This contention is meritless: DuFour has the same interest in invalidating any
 4 debt to Monterey under Be’s contract and obtaining restitution from Monterey as every other
 5 Class member. None of the asserted differences between DuFour and the other Class members
 6 alters this basic interest in any way.

7 Monterey also contends that DuFour cannot be an adequate class representative because
 8 she did not know “what benefits other Be members received through their membership” or what
 9 representations Be made to the other Class members. (Def.’s Opp. at 19.) This does not mean
 10 DuFour is inadequate. The level of “knowledge required to qualify a class representative is low;
 11 a party . . . will be deemed inadequate only if she is “startlingly unfamiliar” with the case.”
 12 *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004). “It is not necessary that a
 13 representative ‘be intimately familiar with every factual and legal issue in the case;’ rather, it is
 14 enough that the representative understand the gravamen of the claim.” *Id.* (quoting *In re Worlds*
 15 *of Wonder Sec. Litig.*, No. 87-5491, 1990 WL 61951, *3 (N.D. Cal. Mar. 23, 1990)). “Requiring
 16 more [knowledge] risks undermining the class vehicle”; adequacy cannot be so onerous that it
 17 “convert[s] the class action into a device usable only by individuals [so sophisticated] that they
 18 would be capable of acting as their own attorneys *Id.* at 612 (citation omitted). “[T]he reality of
 19 complex cases of this type is that clients must defer a great amount of discretion to their
 20 lawyers.” *In re Worlds of Wonder*, 1990 WL 61951, *3. DuFour’s knowledge is sufficient to
 21 fulfill Rule 23’s adequacy requirement.

22 V. The Class Meets Rule 23(b)’s Requirements

23 **Rule 23(b)(2) Certification:** Monterey points out that Plaintiffs cannot certify their
 24 claims for restitution under Rule 23(b)(2). (Def.’s Opp. at 20.) This is obvious after *Dukes*, and
 25 Plaintiffs do not dispute it. However, the presence of those claims does not prevent certifying a
 26 class under Rule 23(b)(2) which is limited to *statutory* damages, as well as declaratory and
 27 injunctive relief. “[A]n action may be brought or maintained as a class action with respect to
 28 particular issues.” Fed. R. Civ. P. 23(c)(4). “Even if the common questions do not predominate

1 over the individual questions so that class certification of the entire action is warranted, Rule 23
 2 authorizes the district court in appropriate cases to isolate the common issues under Rule
 3 [23(c)(4)] and proceed with class treatment of these particular issues.” *Valentino v. Carter-*
 4 *Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

5 **Predominance:** Opposing certification under Rule 23(b)(3), Monterey again cites a
 6 laundry list of possible variations that purportedly preclude class certification. (Def.’s Opp. at
 7 21-23.) Predominance concerns “the balance between individual and common issues.” *In re*
 8 *Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009). “Rule
 9 23(b)(3) . . . does *not* require a plaintiff seeking class certification to prove that each element of
 10 her claim is susceptible to classwide proof, [but only] that common questions predominate over
 11 any questions affecting only individual class members.” *Amgen*, 133 S. Ct. at 1196 (emphasis in
 12 original; citations, punctuation omitted). Common issues predominate when “[i]ndividualized
 13 issues are few, and most of them are likely to be relatively easy [to resolve].” *Local Joint Exec.*
 14 *Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1166 (9th Cir.
 15 2001). *See also Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D. Cal. 2008)
 16 (“[i]ndividual issues do not render class certification inappropriate so long as such issues may
 17 effectively be managed”). Monterey has not shown that any of the thorny individualized
 18 questions it presents are in fact necessary to resolve the Class’s claims. Conversely, those few
 19 individualized inquiries that may end up being material are easy to administer.

20 **Superiority:** Monterey argues that a class action is not superior, citing a “complete lack
 21 of individual actions.” (Def.’s Opp. at 23.) Monterey misunderstands the significance of these
 22 facts. “The lack of other litigation mitigates in favor of, not against, a finding of superiority.”
 23 *Krzesniak v. Cendant Corp.*, No. 05-05156, 2007 WL 1795703, *19 (N.D. Cal. June 20, 2007)
 24 (citing *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1191 (9th Cir. 2001)). Class
 25 actions are preferable where

26 plaintiffs may not know their rights are being violated, may not have a monetary
 27 incentive to individually litigate their rights, and may be unable to hire competent
 28 counsel to protect their rights. A class action is judicially efficient in lieu of
 clogging the courts with thousands of individual suits.

1 *Herrera*, 274 F.R.D. at 682 (citation omitted). The fact that few Class members know their
 2 contracts with Be violated AFTSA brings the superiority of a class action into sharp relief.

3 **VI. The Plaintiffs' Class Claims Are Meritorious**

4 Again, the law is clear that Plaintiffs do not need to prove their claims at this juncture.
 5 See *Amgen*, 133 S. Ct. at 1194-95. Nonetheless, the class certification decision is outcome-
 6 determinative and Plaintiffs need a complete record if there is an appeal under Rule 23(f). Hence,
 7 in an abundance of caution, Plaintiffs respond below to Monterey's attacks on the merits of the
 8 class claims.

9 **A. Monterey's Statutory Interpretation Thwarts the Legislature's Intent**

10 The central theme in Monterey's Opposition is that Be's contracts are voidable, rather
 11 than void. (Def.'s Opp. *passim*.) AFTSA provided that contracts which violated section 1701.4
 12 were "voidable at the election of the artist and, in that case, shall not be enforceable by the
 13 advance-fee talent service." Cal. Lab. Code § 1701.4(d) (2009). Monterey contends class
 14 certification is improper because "Plaintiff has not pointed to a single class member who elected
 15 to void their contract with Be." (Def.'s Opp. at 14.) At the outset, the Court should not let this
 16 argument go on without requiring Monterey to divulge whatever secret handshake it contends is
 17 necessary for Class members to void their contracts. Moreover, Monterey's interpretation of
 18 section 1701.4(d) violates "[t]he most important canon of statutory construction[;] that each
 19 statute must be interpreted to give effect to the Legislature's intent." *People v. Henderson*, 115
 20 Cal. App. 4th 922, 930 (2004).⁹ The Legislature's intent in requiring advance-fee talent services
 21 to incorporate the statutorily-required refund and cancellation provisions into their contracts
 22 could not be clearer: the Legislature wanted to ensure consumers were informed about their
 23 statutory rights. Cf. Cal. Lab. Code § 1701.4(a) (2009). Given section 1701.4(a)'s obvious
 24 function of informing consumers about their rights, it would perversely thwart the Legislature's
 25 intent to interpret section 1701.4 in a manner that frustrated Class members' claims because Be's

26 ⁹ *California v. Altus Fin., S.A.*, 36 Cal.4th 1284, 1295 (2005) ("fundamental task" of statutory
 27 construction under California law "is to ascertain the intent of the lawmakers so as to
 28 effectuate the purpose of the statute"); *California Teachers Assn. v. Governing Bd. of Rialto
 Unified School Dist.*, 14 Cal.4th 627, 632 (1997) ("intent of the Legislature" is "touchstone
 of statutory interpretation").

1 contracts failed to notify them about their rights under AFTSA to begin with. “A literal
 2 construction of a [statute] will not control when such a construction would frustrate the manifest
 3 purpose of the enactment as a whole.” *Arias v. Superior Court*, 46 Cal.4th 969, 979 (2009).¹⁰
 4 Monterey’s interpretation of section 1701.4(d) should be rejected.

5 **B. Monterey Does Not Distinguish Plaintiffs’ Case Law Holding Be’s Contracts
 6 Void**

7 Plaintiffs cited *Eden Township Healthcare Dist. v. Sutter Health*, 202 Cal.App.4th 208
 8 (2011) and *People ex rel. State of Cal. v. Drinkhouse*, 4 Cal.App.3d 931, 935 (1970) for the
 9 proposition that contracts in violation of a statute are void, *even when the statute states such
 10 contracts are voidable*. Monterey’s effort to distinguish these cases on the basis that they involve
 11 “a penal statute” (Def.’s Opp. at 14) must fail. AFTSA was a penal statute, too: any “person who
 12 willfully violates any provision of [chapter 1701, i.e., AFTSA] is guilty of a misdemeanor.” Cal.
 13 Lab. Code § 1701.13 (2009). The general principle (applicable here) is that, when a statute
 14 imposes certain restrictions on a contract, the statute “renders such contract void if made in any
 15 other way. . . . [Such contracts are] void because the statute prescribes the only method in which
 16 a valid contract can be made.” *Duffens v. Valenti*, 161 Cal.App.4th 434, 454, 455 (2008).

17 Monterey has not tried to distinguish *Duffens*.

18 **C. Even if Be’s Contracts Are “Voidable,” Plaintiffs Still Have Viable Claims**

19 Even if Be’s contracts are “voidable,” rather than void, Plaintiffs still have viable class
 20 claims. Monterey distorts case law to try to impose an unwarranted scienter requirement on
 21 Plaintiffs’ class contract claims. Finally, DuFour has a valid breach of contract claim.

22 **1. Plaintiffs’ Claims Do Not Require Be’s Contracts to Be Void**

23 Even if the Court holds Be’s contracts are “voidable,” Plaintiffs have viable class claims.
 24 For instance, the UCL prohibits “any unlawful, unfair or fraudulent business act or practice,”
 25 Cal. Bus. & Prof. Code § 17200, and establishes three independent bases for a UCL action. *Cel-
 26 Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). Monterey

27 ¹⁰ *State ex rel. Dockstader v. Hamby*, 162 Cal.App.4th 480, 488 n.2 (2008) (“[i]nterpreting
 28 statutes literally, without regard to statutory context, may undermine or frustrate legislative
 intent”); *People v. Glasper*, 113 Cal.App.4th 1104, 1114 (2003).

1 does not dispute that Be's contracts violated AFTSA; it cannot offer any support for its assertion
 2 that they are not also illegal. Even if they were not unlawful, Be's contracts would certainly be
 3 unfair. *Id.* at 187 (unfair conduct "violates the policy or spirit of [a law] because its effects are
 4 comparable to or the same as a violation of the law"). Plaintiffs' have a viable class claim under
 5 the UCL's unlawful and unfair prongs.

6 Monterey also directly violated the law by collecting on Be's contracts without disclosing
 7 to Class members that they had the right to void the contracts at any time. Such an omission
 8 would certainly be misleading under the UCL and CLRA: "[a] perfectly true statement couched
 9 in such a manner that it is likely to mislead or deceive the consumer, such as by failure to
 10 disclose other relevant information, is actionable" under the CLRA and UCL. *Aron v. U-Haul
 Co. of Cal.*, 143 Cal.App.4th 796, 807 (2006) (citation omitted).

12 **2. Monterey Distorts Case Law**

13 Monterey contends it has no liability for the defects in Be's contracts, but it
 14 mischaracterizes the case law which holds Plaintiffs do not need to prove scienter on their
 15 contract-based claims. Monterey characterizes *Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d
 16 1082 (N.D. Cal. 2006) as ruling that one defendant "could not be held liable under RICO,
 17 CLRA, or UCL" without knowledge of the other defendants' "bad conduct." (Def.'s Opp. at 8.)
 18 The passage cited by Monterey, however, relates only to the association-in-fact element of a
 19 RICO claim – it has nothing to do with a scienter requirement in the CLRA or UCL. Monterey
 20 also tries to distinguish *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.4th 163 (2000) on
 21 the basis that *Cortez* decided whether back wages were available under the UCL. (Def.'s Opp. at
 22 9.) Indeed, *Cortez* also decided that normally a "plaintiff need not show that a UCL defendant
 23 intended to injure anyone through its unfair or unlawful conduct [because the] UCL imposes
 24 strict liability[.]" *Cortez*, 23 Cal.4th at 181. Likewise, Monterey characterizes *Vasquez v.
 25 Superior Court*, 4 Cal.3d 800 (1971) as holding that the "holder in due course" rule is only a
 26 defense for consumers and does not permit restitution claims against a finance company. This is
 27 demonstrably false. *Vasquez* *explicitly* rejected the argument that

28 plaintiffs may not bring an affirmative action against [a finance company] for

rescission but may only assert [a] defense of fraud in an action by the finance companies to collect on the contracts and then only to the extent of the amount still owing.

Id. at 823. “[T]he plain meaning of the Holder Rule allows the [purchaser] to assert *all claims* against [the finance company] they might otherwise have against [the seller].” *Lafferty v. Wells Fargo Bank*, 213 Cal.App.4th 545, 551 (2013) (emphasis added).

3. DuFour Has a Valid Breach of Contract Claim

DuFour’s breach of contract claim is simple: she paid for five years of service in 2009, so Be should have provided her services through March 2014. (*Cf.* Dkt. #7-2 at 6.) While many Class members are in the same boat, Monterey attacks DuFour’s claim on the basis that DuFour did to choose to receive services from My Talent Services (“MTS”) which supposedly offered the same services that Be did. (Def.’s Opp. 1-2, 6.) But MTS was not an acceptable substitute. Again, “[t]he gist of [Be’s marketing] was that Be had the experience, connections, and the relationships to facilitate its clients’ professional success in the entertainment industry.” (DeSando Decl. ¶15.) Assignment of a contractual performance is prohibited where there is “evidence that a personal skill, promise, or performance was expected by one of the contracting parties.” *Superbrace, Inc. v. Tidwell*, 124 Cal.App. 4th 388, 404 (2004).¹¹ Given the representations about Be’s services, Class members did not have to accept substitute performance from MTS. Indeed, DuFour testified that she did not retain MTS’s services because Be had closed, she did not want to accept services from an unknown company, and because she did not want to expose her daughter to additional trauma. (DuFour Dep. at 117:11-118:5; 119:24-120:1.)

VII. Conclusion

Monterey has not pointed to any factual variation between Class members that is actually material to the class claims. There are no material factual variations that cannot be overcome through well-supported, reasonable inferences about Class members’ states of mind or ministerial reviews of official records. The Class has viable claims that can be readily certified.

¹¹ See also *Unite Here Local 30 v. Dep’t of Parks and Recreation*, 194 Cal. App. 4th 1200, 1213 (2011) (“[w]here a contract calls for the skill, credit or other personal quality of the promisor, it is not assignable”; citation omitted).

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